

(2)  
No. 90-610

Supreme Court, U.S.  
FILED

DEC 10 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

---

**EDWARD WALTHER, PETITIONER**

*v.*

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**KENNETH W. STARR**

*Solicitor General*

**ROBERT S. MUELLER, III**

*Assistant Attorney General*

**JOEL M. GERSHOWITZ**

*Attorney*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 514-2217*

---

### **QUESTION PRESENTED**

Whether the district court has the authority to sentence petitioner to a no-parole term of imprisonment for attempting and conspiring to possess more than 1,000 kilograms of marijuana with intent to distribute it.



## TABLE OF CONTENTS

|                     | Page |
|---------------------|------|
| Opinion below ..... | 1    |
| Jurisdiction .....  | 1    |
| Statement .....     | 2    |
| Argument .....      | 3    |
| Conclusion .....    | 6    |

## TABLE OF AUTHORITIES

### Cases:

|  |      |
|--|------|
| <i>Bifulco v. United States</i> , 447 U.S. 381 (1980) .....            | 4, 5 |
| <i>United States v. Brown</i> , 887 F.2d 537 (5th Cir. 1989) .....     | 4    |
| <i>United States v. Robinson</i> , 883 F.2d 940 (11th Cir. 1989) ..... | 4-5  |
| <i>United States v. Rush</i> , 874 U.S. 1513 (11th Cir. 1989) .....    | 4, 5 |

### Statutes:

|  |            |
|--|------------|
| Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6470(a), 102 Stat. 4377 ..... | 5          |
| 21 U.S.C. 841(a) (1) .....   | 2          |
| 21 U.S.C. 841(b) (1) (A) .....   | 2, 4, 5    |
| 21 U.S.C. 846 (1982) .....   | 2, 4       |
| 21 U.S.C. 846 .....  | 2, 3, 4, 5 |
| 21 U.S.C. 960 .....  | 5          |
| 21 U.S.C. 963 .....  | 5          |



**In the Supreme Court of the United States**

**OCTOBER TERM, 1990**

---

**No. 90-610**

**EDWARD WALTHER, PETITIONER**

*v.*

**UNITED STATES OF AMERICA**

---

***ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT***

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 911 F.2d 741 (Table).

**JURISDICTION**

The judgment of the court of appeals was entered on July 18, 1990. The petition for a writ of certiorari was filed on October 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

**STATEMENT**

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of attempting to possess more than 1,000 kilograms of marijuana with intent to distribute it and conspiring to possess the same quantity of marijuana with intent to distribute it, both in violation of 21 U.S.C. 841(a)(1) and 846. At the time that petitioner committed the offense, Section 846 provided for punishment "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Possession of 1,000 kilograms of marijuana with intent to distribute it was punishable under 21 U.S.C. 841(b)(1)(A), which provided for a sentence of at least ten years' imprisonment for the offense and stated that "[n]o person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed." Petitioner was sentenced to concurrent ten-year prison terms, which the district court believed to be the minimum mandatory sentence. Pet. App. A1. The court of appeals affirmed. 867 F.2d 1334 (11th Cir.), cert. denied, 110 S. Ct. 144 (1989).

Subsequently, petitioner filed a motion to correct an illegal sentence, alleging that the court had improperly imposed a ten-year sentence. The government conceded error because Section 846 states that the penalty for conspiracy and attempt "may" be the same as the maximum penalty available under Section 841(b)(1)(A) for the substantive offense, but Section 846 does not provide that the defendant "must" be sentenced to at least a ten-year nonparolable term. The district court vacated petitioner's



sentence and held a new sentencing hearing, at which the government argued that while a sentence of fewer than ten years could be imposed, the sentence "must necessarily be without parole." Pet. App. A2. The district court then sentenced petitioner to concurrent six-year prison terms without possibility of parole. *Id.* at A3.

Petitioner took an appeal, arguing that he may not be subject to a nonparolable sentence. The court of appeals rejected that claim. Pet. App. A1-A6. The court concluded that "because Section 846 authorized the imposition of imprisonment or fines up to the maximum provided for the substantive offense, the district court could properly impose non-parolable terms of imprisonment but was not required to do so." Pet. App. A5. Nonetheless, concerned that petitioner's sentence "might have been affected by the district court's belief, clearly expressed in the sentencing transcript, that it was required to impose non-parolable sentences," the court vacated the sentence and remanded for resentencing. *Id.* at A5-A6.

### ARGUMENT

Petitioner renews his contention that he may not be sentenced under Section 846 to serve a term of imprisonment without possibility of parole. That challenge to his sentence is not currently ripe for review, because the court of appeals vacated his sentence. On remand, the district court may decide not to deny petitioner the possibility of parole, in which case petitioner's claim will be moot. If, on the other hand, petitioner's sentence is made nonparolable and the sentence is upheld on appeal, petitioner will be able to raise his contention in a petition for a writ of certiorari at that time.



In any event, petitioner's claim fails on the merits. The language of the pertinent statutory provisions supports the conclusion of the court of appeals that sentencing courts may impose sentences of imprisonment without possibility of parole under Section 846. At the time of petitioner's offense, Section 846 provided for punishment by imprisonment or fine "not [to] exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Section 841(b)(1)(A), in turn, provided that "[n]o person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed." Accordingly, a defendant sentenced to prison under Section 846 for attempting or conspiring to commit an offense punishable under Section 841(b)(1)(A) may be denied the possibility of parole. Otherwise, such a defendant could not receive a prison sentence equal to the maximum permitted for the underlying substantive offense, as Section 846 unmistakably allows.<sup>1</sup>

Petitioner argues (Pet. 15-17) that the decision below is contrary to decisions holding that the special parole and mandatory minimum sentence provisions of Section 841(b) do not apply to Section 846. See *Bifulco v. United States*, 447 U.S. 381 (1980) (special parole); *United States v. Brown*, 887 F.2d 537, 541 (5th Cir. 1989) (mandatory minimum sentence); *United States v. Robinson*, 883 F.2d 940 (11th Cir.

---

<sup>1</sup> Petitioner argues (Pet. 19-20) that if the parole ineligibility provision of Section 841(b)(1)(A) applies at all to Section 846, the sanction must be mandatory rather than discretionary. Section 846, however, provides that the defendant "may" be sentenced up to the maximum term prescribed for the underlying substantive offense, but it does not require any particular sentence.

1989) (same); *United States v. Rush*, 874 U.S. 1513 (11th Cir. 1989) (mandatory minimum sentence under 21 U.S.C. 960 and 963). There is no merit to that contention. In *Bifulco*, the Court held that Section 846 does not authorize the imposition of a special parole term even though that sanction is included in the penalty provisions of Section 841(b). The Court reasoned that Section 846 limits the authorized penalties for its violation to "imprisonment" and/or "fine," and that neither of those penalties embraces the "functionally distinct" sanction of special parole. 447 U.S. at 388. Unlike a special parole term, which is added onto a term of imprisonment, parole ineligibility affects the length of the term of imprisonment a defendant must serve. Accordingly, the court of appeals was correct in concluding that "the non-parolable terms of imprisonment required by Section 841(b) (1) (A) fall within the meaning of the word 'imprisonment' as it is used in Section 846." Pet. App. A4-A5.

The decisions holding that Section 846 offenders are not required to serve the mandatory minimum prison terms set out in Section 841(b) (1) (A) are also consistent with the decision below. The court of appeals held that the district court was not *required* to sentence petitioner to a mandatory minimum term, but that the district court *could* impose a term of imprisonment that would in effect be mandatory, *i.e.*, that would not be subject to reduction by the grant of parole.

Finally, Section 846 was amended in 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6470(a), 102 Stat. 4377. The statute now provides for the same penalties, including parole ineligibility, as those prescribed for the underlying sub-

stantive offense. Thus, the issue presented by this case applies only to offenses committed before the effective date of the 1988 statute and is therefore of rapidly diminishing importance.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

ROBERT S. MUELLER, III  
*Assistant Attorney General*

JOEL M. GERSHOWITZ  
*Attorney*

DECEMBER 1990

